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State Land Use Control: Why Pending Federal Legislation Will Help

John L. Low IV

STATE LAND USE CONTROL: WHY PENDING FEDERAL LEGISLATION WILL HELP

Land use regulation in the form of planning, zoning, and subdivision control in the United States has traditionally been dominated by local governments; however, the urbanization of this country's population, commencing with World War II and continuing to the present,[1] has demonstrated the inadequacies of this local domination. Municipalities and counties are no longer of sufficient size and political influence to deal with many of today's land use problems, such as air and water quality, suburban sprawl, and economic and orderly allocation of available land space among competing demands. Excessive reliance upon municipalities as the institutions to exercise the land use regulatory power in America has not only failed to promote a solution of many land use problems, it has also introduced some previously nonexistent complications, such as exclusionary and fiscal zoning and conflicting land uses at municipal borders. The states originally established this autocracy of the local governments in land use control by delegating their police power to municipalities and counties. The states now should take the initiative in reordering the distribution of powers among the various levels of government in the zoning and planning fields. Six states already have realized their responsibilities in this area and have taken legislative steps to require municipalities to inject larger public interests into local land use decisions.[2] This progress has taken three forms: direct statewide land use control, state review of land use control as practiced by local governments, and the creation of regional land use control organizations.

Unfortunately, this kind of progress in land use control has occurred in only six states. Although state legislatures have been especially interested in the subject of statewide and regional land use control lately,[3] only one state, Florida, has adopted truly effective land

1. COMM'N ON POPULATION GROWTH AND THE AMERICAN FUTURE, POPULATION AND THE AMERICAN FUTURE 16 (1972).

2. These states are California, discussed at text accompanying notes 69-88 *infra*; Hawaii, discussed at text accompanying notes 89-94 *infra*; Maine, discussed at text accompanying notes 95-108 *infra*; Vermont, discussed at text accompanying notes 109-16 *infra*; Colorado, discussed at text accompanying notes 117-25 *infra*; and Florida, discussed at text accompanying notes 126-51 *infra*.

3. For example, in the 1972 session of the California legislature, at least four bills on the subject of statewide or regional land use control were introduced. S.B. 37, S.B. 776, S.B. 1368, A.B. 220 (1972).

use controls of statewide application within the past three years.[4] If past state legislation in this field discloses any general pattern, it seems to be that a state will not act in a decisive manner until it is confronted with an environmental or land use crisis which makes the state government's inactivity politically untenable.[5] But even if the sluggish pace of state legislation were acceptable, this reflexive type of approach to solving statewide land use problems represents the antithesis of sound and efficient land use planning and control. Rational land use regulation and planning requires that a land use program precede the land use problem rather than be a reaction to it.[6] Unnecessary environmental damage and remedial costs will be incurred unless the states are either persuaded or coerced into developing effective regional or statewide land use control processes before they are confronted with grave land use dilemmas.

Fortunately, the federal government has taken notice of this situation. Under two bills currently pending before Congress, the incentive of federal funding will be used to encourage state land use regulation as a substitute for the crisis/reaction process which now induces state legislation in the land use field. The National Land Use Policy and Planning Assistance Act of 1973 has already passed the Senate;[7] the Land Use Planning Act of 1973[8] is very similar to the Senate bill and is now being considered in the House of Representatives. The enactment of either bill would provide a nationwide response to what has become a nationwide problem. By promoting state legislation patterned after the American Law Institute's Model Land Development Code,[9] either piece of federal legislation would prompt many states to adopt sound land use control techniques before they experience serious land use crises.

The States' Contribution to Regional Land Use Problems

Zoning, as well as most other methods of land use control em-

4. FLA. STAT. ANN. §§ 380.012-.10 (1973).

5. In a report on state control of land use prepared for a conference of the American Institute of Planners, one professional planner noted that "state government in general is prone to taking up [land use control] issues reluctantly and on a crisis to crisis, piece-meal basis." JOINT COMM. ON OPEN SPACE LANDS, CAL. LEGISLATURE, PREPARATION AND ADOPTION OF THE OPEN SPACE ELEMENT 118 (Jan. 1972).

6. One of the "basic attributes" of land use planning is its "future orientation" by which objectives to be achieved at some point in the future are established in the present. *See* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 1 (1971) [hereinafter cited as HAGMAN].

7. S. 268, 93d Cong., 1st Sess. (1973).

8. H.R. 10294, 93d Cong., 1st Sess. (1973).

9. ALI MODEL LAND DEVELOPMENT CODE Arts. 7-8 (Tent. Draft No. 3, 1971) suggest the establishment of a regional and statewide process of land use planning and a state program for land use control.

ployed in the United States today,[10] is an exercise of the police power of the states.[11] Historically, however, land use controls in the United States have been most frequently exercised by municipalities.[12] The zoning legislation adopted by most states was modeled after the Commerce Department's Standard State Zoning Enabling Act of 1924;[13] that act delegated the state's power to regulate land use to the municipalities.[14] The states thus initially defined their primary role in land development regulation as that of providing local governments with land use enabling legislation.[15] This early abdication of zoning responsibility by the states[16] permitted local governments to dominate land use control and to determine the course of development in terms of their own local self-interest.[17]

Fragmented Land Use Decision Making

The tradition of local control over land use decisions, together with a proliferation of local governmental units in urban areas,[18] resulted in the geographical fragmentation of land use planning and regulation.[19] The concept of fragmentation is illustrated best by the often

10. Other forms of land use control currently found in varying degrees of prevalence include subdivision mapping, building and housing codes, private controls such as deed restrictions and covenants, eminent domain powers and official maps. *See generally* HAGMAN, *supra* note 6.

11. HAGMAN, *supra* note 6, § 33.

12. In 1968 there were 6,800 municipalitites in the United States which had adopted zoning ordinances. Counties were the next most numerous level of government engaged in zoning; 711 had zoning ordinances in 1968. M. CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES 98 (1971) [hereinafter cited as CLAWSON].

13. D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 593 (1971) [hereinafter cited as MANDELKER]; McBride, *The Governmental Decision-Making Structure for Land-Use Regulation*, 7 INSTITUTE ON PLANNING AND ZONING 153, 154 (1968).

14. Slavin, *Toward a State Land-Use Policy*, 4 LAND-USE CONTROLS Q. No. 4, 42, 47 (Fall 1970); S. REP. No. 92-869, 92d Cong., 2nd Sess. 34 (1972).

15. CLAWSON, *supra* note 12, at 64.

16. Some states did retain a few land use powers such as participation by a state planning department in some local zoning decisions and state control of state-owned land. See R. ANDERSON, 1 AMERICAN LAW OF ZONING 3.03 (1968) [hereinafter cited as ANDERSON].

17. 2 *Id.* § 18.01.

18. One author has observed that the proliferation of local governments in urban areas began in the 1920's when, because of mounting internal social and economic problems, the central cities ceased annexing developing adjacent areas. E. FALTERMAYER, REDOING AMERICA 31-32 (1968) [hereinafter cited as FALTERMAYER].

19. *See* SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, S. REP. No. 92-869, 92d Cong., 2nd Sess. 37 (1972). Another factor which leads to fragmented land use control in urban areas is the generally lenient state policy on municipal incorporation. *See generally* HAGMAN, *supra* note 6, § 26. For a typical case history of fragmentation in both the geographical and political spheres, see the discussion of Santa Clara County, California, in II POWER AND LAND IN CALIFORNIA, VI-31 to -56 (1971).

conflicting interests of a central city and its surrounding suburbs. The central city plans and zones in terms of its own self interest; that interest is often incongruous with the best interest of the metropolitan region as a whole.[20] By the same token, land use regulation by suburban municipalities is largely aimed at the preservation of property values and suburban tranquility with little recognition of wider regional considerations.[21]

This conflict between central and suburban municipalities has been further aggravated by what is known as "fiscal zoning."[22] That is, developing communities often compete to attract land uses such as clean, light industry and regional shopping centers; those types of uses increase a community's tax base without requiring large additional expenditures for municipal services. Thus, the amount of suburban land that is available for other less desirable uses such as low income housing or heavier, "dirty" industry is greatly diminished. Further, many suburban communities seek to occlude entirely some unwanted land uses such as mobile home parks and outdoor theatres.[23]

Border Conflicts

In addition to the fragmentation of land use decision making excessive reliance upon municipalities to exercise planning and zoning powers often causes incompatible land uses along municipal boundaries. Such conflicts occur either when there is no planning or zoning being undertaken in the area beyond the municipal limits or when two municipalities directly abut and incompatibly zone the adjacent areas within their jurisdiction. Thus, it sometimes happens that one side of a street is zoned for single-family residences and the other side for industry.[24]

20. NAT'L COMM'N ON URBAN PROBLEMS, PROBLEMS OF ZONING AND LAND-USE REGULATION 51 (1968) [hereinafter cited as PROBLEMS OF ZONING].

21. D. MANDELKER, *supra* note 12, at 731-32; L. RODWIN, NATIONS AND CITIES 255 (1970); Vestal, *Government Fragmentation in Urban Areas*, 43 U. COLO. L. REV. 155, 156 n.4 (1971) [hereinafter cited as Vestal]; *cf.* ROCKEFELLER BROTHERS FUND, THE USE OF LAND 235 (1973) [hereinafter cited as THE USE OF LAND]. The Rockefeller study places the same problem in an environmental context by pointing out that a local government might envision a coastal wetland as a potential development site rather than an integral and necessary portion of a regional ecological system.

22. "Fiscal zoning" is described in Sacks & Campbell, *The Fiscal Zoning Game*, 36 MUNICIPAL FINANCE 140 (1964).

23. Professor Hagman employs outdoor theatres to suggest that some land uses are excluded from both central and suburban cities. HAGMAN, *supra* note 6, § 97.

24. This was precisely the situation in the classic case of Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182 (L. Div. 1953), *aff'd* 15 N.J. 238, 104 A.2d 441 (1954). The lower court held that a municipality must consider the character of land use prevalent in the area just outside the municipal borders when making a zoning decision which has extramunicipal effects. 28 N.J. Super. 26, 43, 100 A.2d 182, 191.

These twin problems of fragmentation and municipal border conflicts have been greatly acerbated by the intense urbanization which began in this country following World War II.[25] This increasing concentration of the nation's population in the large urban areas is expected to continue well into the next century.[26] Thus, without remedial legislation or a drastic change in the nation's growth and population trends, land use control problems in the urban areas can be expected to intensify.

Traditional State Response to Municipal Land Use Control Problems

Extraterritorial Planning and Zoning

The states have not been blind to the problems created by the excessive influence of the municipalities in land use control. In an effort to infuse some degree of regional considerations into land use decision making, most states have adopted enabling statutes which authorize extraterritorial planning by constituent municipalities.[27] The extraterritorial legislation in most states,[28] however, renders little more than "lip service" to the concept of coordinating land use among municipalities. The power of extraterritorial planning has had little effect in remedying regional land use problems since most states have failed to provide municipalities with the additional capacity to enforce the plans.[29] Recognition of this shortcoming motivated twelve states to entrust extraterritorial zoning powers to some of their municipalities.[30] The cities which operate under these statutes possess sufficient coercive zoning authority to enable them to control the development

25. CLAWSON, *supra* note 12, at 33; Vestal, *supra* note 20, at 155 *citing* J. Pickard, Future Growth of Major U.S. Urban Regions, Population Trends, *Hearings Before the Ad Hoc Subcommittee on Urban Growth of the House Committee on Banking and Currency*, 91st Cong., 1st Sess., pt. 1, at 85 *et seq.* (1969).

26. NAT'L COMM'N ON URBAN PROBLEMS, THE CHALLENGE OF AMERICA'S POPULATION OUTLOOK—1960 TO 1985 26 (1968). Between 1968 and 1985, the metropolitan population of the United States will increase 57.8% while the country's population as a whole will increase only 40.6%. *Id.* By the year 2000, 83% of the nation's population will be concentrated in ten urban areas which will occupy only one-sixth of the United States' land area. Hartke, *Toward a National Growth Policy*, 22 CATH. U.L. REV. 231 (1973).

27. *See generally* Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, 1966 WASH. U.L.Q. 1, 25-30 [hereinafter cited as Becker].

28. *E.g.*, ARK. STAT. ANN. § 19-2827 (1947); N.J. REV. STAT. § 40:55-1.11 (Supp. 1973); N.Y. GEN. MUN. LAW § 237 (McKinney 1965).

29. R. YEARWOOD, LAND SUBDIVISION REGULATION 257 (1971) [hereinafter cited as YEARWOOD]. Extraterritorial planning has been termed "quite meaningless" when not accompanied by extraterritorial zoning powers. Becker, *supra* note 27, at 30.

30. Cunningham, *Land Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 380 (1965) [hereinafter cited as Cunningham].

of unincorporated areas surrounding them[31] in radii varying from one to six miles.[32]

In theory, this enlargement of a city's zoning power should have improved the fragmentation problem in multijurisdictional areas by decreasing the importance of the boundaries of governmental units; but this amelioration has not occurred in most cases.[33] The practical problems which have prevented effective extraterritorial zoning have been numerous. First, because extraterritorial zoning controls never extend over six miles, they obviously provide no assistance in promoting orderly metropolitan growth when development occurs more than six miles from the central city's boundaries.[34] Second, while the greatest need for coordinated land use regulation generally arises in areas where there are a multitude of governmental subdivisions,[35] the effectiveness of extraterritorial zoning in such regions is seriously impeded by the state legislatures' failure to grant to central cities the power to zone within the boundaries of their incorporated neighboring suburban communities.[36] Third, conflicts have occurred repeatedly when a large number of municipalities within a region have promulgated separate, uncoordinated land use plans[37] even though the individual plans are operative outside individual municipal boundaries. A fourth impediment to the effective utilization of extraterritorial zoning as a means of combating fragmentation has been the fact that the localized nature of the zoning power has fostered insular and self-centered attitudes on the part of the zoning municipalities.[38]

County Planning and Zoning

A second solution to regional land use control problems which

31. For a recent case which upheld the propriety of a municipal zoning ordinance restricting a landowner in the use of his land located within the area of extraterritorial control, see Gastonia v. Parrish, 271 N.C. 527, 157 S.E.2d 154 (1967).

32. Becker, *supra* note 27, at 26, n.61.

33. *Id.* at 55. Professor Becker indicates that a primary effect of extraterritorial zoning powers has been to allow municipalities to adopt even more self-serving positions on problems with regional implications since the geographical scope of the zoning city has been increased. *Id.*

34. *Id.* at 28, n.69.

35. *See* YEARWOOD, *supra* note 29, at 260-62.

36. Becker, *supra* note 27, at 24-25.

37. Miami Shores Village v. Cowart, 108 So. 2d 568 (Fla. 1958); Melli and Devoy, *Extraterritorial Planning and Urban Growth*, 1959 WIS. L. REV. 55, 67. "[The use of extraterritorial controls] may lead to jurisdictional conflicts, bickering and hard feelings, rather than to cooperation between the governments of metropolitan areas." Jones, *The Organization of a Metropolitan Region*, 105 U. PA. L. REV. 538, 542 (1957).

38. This self-centered attitude is called a "major disadvantage" of extraterritorial zoning in W. GOODMAN, PRINCIPLES AND PRACTICE OF URBAN PLANNING 407 (1968) and a "basic fallacy" in Becker, *supra* note 27, at 28.

has been widely tested by various states is county planning and zoning. Although approximately forty states now authorize some form of county zoning,[39] the county zoning body is usually granted authority to zone only in the unincorporated areas of the county.[40] This is a significant limitation to county zoning since the county and the cities located therein often pursue separate land use plans and thereby often authorize conflicting land uses on adjacent properties located close to a city's boundary.[41]

There are two further limitations on the effectiveness of county zoning in combating fragmentation. The historical dominance of municipal governments in the zoning field militates against effective utilization of county land use regulation to inject regional considerations in land use decisions.[42] Also, municipalities generally have larger and more competent planning staffs than those of the counties;[43] the administration of most county governments is poorly organized to implement and pursue effective land use planning and control.[44]

Regional Land Use Planning

A third mechanism which has gained widespread acceptance among the states in their quest to provide land use control with a governmental base larger than that of a municipality is regional land use planning. Regional planning has been defined as a device "to guide and control physical development in a multijurisdictional area."[45] Regional planning may be distinguished from local planning by its geographic compass, its multijurisdictional nature, and its generally comprehensive or multifunctional scope.[46] Although in earlier times the term "regional" was used to refer to county-wide planning,[47] by 1966 thirty-eight states had adopted regional planning legislation which de-

39. HAGMAN, *supra* note 6, § 40 at 85.

40. *E.g.*, ILL. ANN. STAT. ch. 34, § 3151 (Smith Hurd Supp. 1973); MINN. STAT. ANN. § 394.21-.23 (1968); MISS. CODE ANN. § 17-1-3 (1972); WIS. STAT. ANN. § 59.97(4) (Supp. 1973).

41. Becker, *supra* note 27, at 20.

42. NAT'L COMM'N ON URBAN PROBLEMS, FRAGMENTATION IN LAND-USE PLANNING AND CONTROL 52 (1969).

43. Becker, *supra* note 27, at 20.

44. Cunningham, *supra* note 30, at 406. For an example of ineffective county planning caused by political conflicts and lack of knowledge and expertise on the part of the county planning commission and board of supervisors, see Ingmire & Patri, *An Early Warning System for Regional Planning*, JOURNAL OF THE AMERICAN INSTITUTE OF PLANNERS 403-04 (Nov. 1971).

45. 3 ANDERSON, *supra* note 16, § 18.02.

46. Wegner, *The Value and Role of Regional Planning*, 7 INSTITUTE ON PLANNING AND ZONING 199, 214-16 (1968).

47. HAGMAN, *supra* note 6, § 12 n.9; Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515, 516 (1957) [hereinafter cited as Haar].

fined regions either by the geographic scope of the particular land use problem (thereby disregarding governmental subdivision boundaries) or by the inclusion of more than one county in the jurisdiction of the planning organization.[48]

Typical regional planning legislation consists of an enabling statute authorizing local governments to operate regional planning agencies, but only with the consent of all the governing bodies of the governmental units to be included in the planning region.[49] Following formation of the regional agency, local governments are usually given the prerogative of withdrawal if they so desire. It has been suggested that the consensual nature of most enabling acts was intended to reduce initial local governmental resistance to forming the regional agency,[50] but providing for this consent in reality gives each constituent local government a veto power over the decisions of the regional board.

Even when the formation and existence of regional planning commissions are mandated statutorily, the plan produced by such a commission is generally only "advisory" in terms of its effect upon the municipalities located within the region.[51] The negative aspects of this "nondirective" type of regional planning legislation were recognized some fifteen years ago by Professor Charles Haar. His analysis of the fragmentation problem at that time included the observation that a regional plan "needs some sort of legal compulsion."[52] But most enabling acts merely require regional commissions to prepare a plan. As now constituted, regional planning commissions simply provide enlightenment and nonmandatory guidance to local planning agencies. This type of planning scheme has also been criticized in the following manner: "This system—with control powers at the bottom local governments and an advisory planning structure permitted but not required at other levels—has not yielded satisfactory control, flexibility or use of resources."[53] Another commentator believes this absence of coercive powers in the regional planning commissions renders them "incapable of coordinating the planning or land use control

48. *See* R. ANDERSON & B. ROSWIG, PLANNING, ZONING AND SUBDIVISION: A SUMMARY OF STATUTORY LAW IN THE 50 STATES 216-18 (1966).

49. *E.g.*, ARK. STAT. ANN. § 19-2820 (1947); CAL. GOV'T CODE § 65061.3 (West 1966); *cf.* IND. STAT. ANN. § 53-1320 (Supp. 1973).

50. 3 ANDERSON, *supra* note 16, § 18.04.

51. *E.g.*, CAL. GOV'T CODE § 65060.8 (West 1966); VERNON MO. STAT. ANN. § 251.180 (1952).

52. Haar, *supra* note 47, at 521. Because most regional planning legislation has changed little since Professor Haar made that statement, his observation remains valid.

53. Coon & Risse, *The Structure of Land-Use Planning*, 21 SYRACUSE L. REV. 375, 379 (1969).

of a region [since their] advice can be ignored and the regional plan bypassed."[54]

This general impotence of regional planning commissions led to the concept of a land use *control* authority with a larger territorial and population base than that of a single municipality or county. In order to increase the effectiveness of regional planning, a regional agency must have the power to require land use decisions and plans of governmental units within a region conform with the regional agency's own decisions and plans.[55] At the local level, this element of control is added to land use planning through the use of official maps, subdivision regulation, and zoning.[56] But local governments have resisted regional land use regulation which grants these types of controls to regional agencies since it requires them to surrender some degree of their sovereignty.[57]

Regional Land Use Control

Without going as far as the creation of regional and metropolitan governments, several states have attempted to remedy particularized land use problems by providing regional planning bodies with a limited degree of enforcement power in special circumstances. For example, a New York statute requires municipalities in areas with either county, metropolitan, or regional planning commissions to submit certain proposed zoning regulations as well as amendments, variances, and exceptions to the current regulations to the appropriate commission.[58] If a proposed change is disapproved by the commission, the municipal agency may proceed with the zoning modification only if a majority plus one of the local board members approve the change and if the reasons for overriding the decision of the regional commission are embodied in a resolution.[59] However, this procedure is required only when the proposed zoning decision or change affects land located within 500 feet of a municipal boundary, state or county recreation area, or state or county highway.[60] Thus, the scope of regional review in

54. 3 ANDERSON, *supra* note 16, § 18.09, at 358. Later in the same work, the author observes that "[u]nder most enabling acts, adoption of a regional plan has no legal consequences." *Id.* § 18.12 at 366.

55. One commentator believes that planning without implementation power is worse than no planning at all because the existence of plans provides the public with the illusion that land use problems are being solved when they actually are not. Vestal, *supra* note 21, at 156-57.

56. ANDERSON, *supra* note 16, § 1.11.

57. L. RODWIN, NATIONS AND CITIES 255 (1970).

58. N.Y. GEN. MUN. LAW § 239m (McKinney Supp. 1973).

59. *Id.*

60. *Id.*

New York is severely limited.[61]

Massachusetts also imposes regional considerations upon local governmental actions in some special circumstances.[62] Concern with exclusionary or "snob" zoning[63] led the state legislature to enact a statute which permits a public agency or nonprofit organization which is being assisted financially by the federal or state government to build low income housing to file its initial application with the local board of zoning appeals.[64] An adverse decision by the local authority may be appealed to the housing appeals committee in the State Department of Community Affairs.[65] At the appellate level regional requirements for low income housing seem likely to be given greater weight. That committee has the authority to overturn a local denial of a building permit which is "unreasonable and not consistent with local needs."[66]

Recent Progress in State Land Use Control

Increasing urbanization and environmental concerns have caused several states to deviate from the general pattern of ineffective legislation outlined above. This recent spate of activity was interpreted by some observers as a harbinger of a general movement towards greater state and regional participation in the land use decisions of local governments.[67] While it is true that a few states have made considerable progress and that many more states are considering reclaiming some of the zoning authority delegated to local governments during the 1920's, the state legislation which has been enacted to date is either limited in scope or attributable to unusual social and political circum-

61. The statute does force local zoning authorities to give some thought to regional requirements and to the extraterritorial impact on proposed zoning changes. For an example of a situation in which this provision of the statute was invoked, see McEvoy Dodge West Ridge, Inc. v. Zoning Bd. of Appeals, 69 Misc. 2d 55, 329 N.Y.S.2d 171 (Sup. Ct. 1972).

62. MASS. ANN. LAWS ch. 40B, §§ 20-23 (Supp. 1973). *See generally* F. BOSSELMAN AND D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 164-86 (1972) [hereinafter cited as BOSSELMAN & CALLIES]; Beal, *Massachusetts Takes Steps to Remove Local Barriers to Low-Income Housing*, 3 LAND-USE CONTROLS Q. no. 4, 33 (1969).

63. "Snob-zoning" is a method of zoning out minority groups and other individuals which a municipality considers "undesirable". It operates by imposing excessively large minimum lot size and floor space requirements for residential land use in addition to other zoning devices which increase the cost of land and housing. HAGMAN, *supra* note 6, § 47. For a discussion of "snob zoning" in relation to the Equal Protection Clause see Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969) [hereinafter cited as Sager].

64. MASS. ANN. LAWS ch. 40B, § 21 (Supp. 1973).

65. *Id.* § 22.

66. *Id.* § 23.

67. BOSSELMAN & CALLIES, *supra* note 62, at 1-4.

stances. A brief survey of recent state legislation will disclose the degree of progress in statewide land use control as well as the impediments to further advances in the nation as a whole.

Critical Area Legislation

When faced with a localized land use crisis, some state legislatures have responded by establishing a governmental agency with authority over only the affected geographical area rather than by solving the local crisis by enactment of land use legislation of statewide application. This localized type of legislation has been labeled "critical area legislation" and has been adopted in several states,[68] but perhaps the most important and noteworthy examples involve two California agencies. Both the Tahoe Regional Planning Agency (TRPA) and the San Francisco Bay Conservation and Development Commission (BCDC) have received nationwide attention.[69]

Tahoe Regional Planning Agency

The Tahoe Regional Planning Agency (TRPA) was created in 1969 in response to pollution problems in Lake Tahoe and uncontrolled development of the lands in the Tahoe basin.[70] TRPA was established by the Tahoe Regional Planning Compact, a joint legislative effort between California[71] and Nevada[72] and the United States Congress.[73] TRPA controls some of the land use decisions which affect

68. *Id.* at 291. The authors discuss five examples of critical area legislation: Bay Conservation and Development Commission (BCDC), *id.* at 108-35; Tahoe Regional Planning Agency (TRPA), *id.* at 291-93; Hackensack Meadowlands Development Commission, *id.* at 293-95; Adirondack Park Agency, *id.* at 295-99; and the Delaware Coastal Zone Act, *id.* at 299-300. The recently enacted California Coastal Zone Conservation Act CAL. PUB. RES. CODE §§ 27000-650 (West Supp. 1974) is another example of critical area legislation.

69. THE USE OF LAND, *supra* note 21, at 153-55; Lamm & Davison, *The Legal Control of Population Growth and Distribution in a Quality Environment: The Land Use Alternatives*, 49 DENVER L.J. 1, 25-7 (1972) [hereinafter cited as Lamm & Davison]. The authors of THE QUIET REVOLUTION were especially impressed with the Bay Conservation and Development Commission. BOSSELMAN & CALLIES, *supra* note 62, at 109. Another author considers the Tahoe Regional Planning Agency effective because of its "rather substantial powers." D. HAGMAN, CALIFORNIA ZONING PRACTICE § 2.18a (Supp. 1973).

70. R. DASMANN, THE DESTRUCTION OF CALIFORNIA 183-85 (1965) contains a discussion of the environmental problems of the Lake Tahoe region. Ayer, *Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup*, 58 CALIF. L. REV. 1273, 1275-79 (1970) [hereinafter cited as Ayer] (furnishes a description of the deterioration of the lake itself and the causes thereof).

71. CAL. GOV'T CODE §§ 66800-01 (West Supp. 1974).

72. NEV. REV. STAT. tit. 21, ch. 277.200-277.220 (1971).

73. Pub. L. No. 91-148 (Dec. 18, 1969). For a narrative of the events leading to the adoption of the compact, see Ayer, *supra* note 70, at 1323-25.

Lake Tahoe, portions of three Nevada counties adjoining the lake and parts of two California counties.[74] Throughout this entire area, TRPA is authorized to establish minimum standards in matters having any effect upon the environment of the region, including such matters as water purity, land subdivision, zoning, land fills, shoreline development, outdoor advertising, and mobile home parks.[75] Any political subdivision within the region may adopt standards higher than those established by the agency, but the minimum standards set by TRPA are binding upon all its constituent communities.[76] Furthermore, the agency can force compliance through judicial action.[77]

TRPA is currently formulating a regional plan that includes consideration of land use problems, transportation requirements, a conservation and recreation plan, and location of public services and facilities.[78] Enforcement of the regional plan and the other decisions of TRPA may prove to be a lengthy and expensive process; the agency currently is facing a potential liability of 250 million dollars in pending inverse condemnation lawsuits and is experiencing difficulty in finding sufficient funds for legal counsel and trial expenses.[79] TRPA is also being criticized for failing to slow the pace of development in the region.[80]

San Francisco Bay Conservation and Development Commission

The second regional planning device of importance located in California is the San Francisco Bay Conservation and Development Commission (BCDC).[81] The San Francisco Bay is surrounded by numerous independent governmental units, each of which has been under fiscal pressure to expand its tax base by allowing the filling and developing of shoreline areas. By the early 1960's it appeared certain that the increasing rate of shoreline development would in time alter

74. CAL. GOV'T CODE § 66801 art. II(a) (West Supp. 1974).

75. *Id.* art. VI(a).

76. *Id.*

77. *Id.* art. VI(e). Only programs and projects undertaken by the respective states themselves are beyond TRPA's control. *Id.* art. VI(d).

78. *Id.* art. V.

79. San Francisco Chronicle, August 24, 1973, at 19, col. 3. For a "blow-by-blow" account of one of these disputes which ended up in court, see THE USE OF LAND, *supra* note 21, at 153-55.

80. McCabe, *Rape of the Lake*, San Francisco Chronicle, Aug. 24, 1973, at 41, cols. 7 & 8. The mayor of South Lake Tahoe, one of the cities under TRPA's jurisdiction, has called the agency an "impotent giant" because of its failure to curb residential and commercial development in the area; he has requested federal assistance while California and Nevada take steps to strengthen the agency. San Francisco Examiner, September 22, 1973, at 2, col. 6.

81. CAL. GOV'T CODE §§ 66601-61 (West Supp. 1974).

the size and appearance of the bay irremediably.[82]

As a solution to the bay fill problem, the California legislature created BCDC to prepare and supervise "a comprehensive and enforceable plan for the conservation of the water of the bay and the development of its shoreline . . . ."[84] BCDC's jurisdiction includes approximately the San Francisco bay waters and 100 feet inland from the shoreline.[85] Placing fill, extracting materials, or making any substantial change in the use of any water, land, or structure within this jurisdiction is prohibited unless approved by the commission.[86] By divesting the Bay Area's cities of final authority over new uses of their shorelines and by promulgating a coordinated plan for development,[87] BCDC has alleviated most fears of drastic deterioration of the bay.[88]

Comprehensive Statewide Land Use Control: Five Case Studies

Although critical area legislation has proved somewhat effective in bringing localized problems under control, it has the obvious disadvantage of providing a solution only *after* the land use problem has developed to a serious juncture. Additionally, "legislative wheels" must be set in motion each time a crisis arises; this is a costly and time-consuming matter for most state governments. Statewide land use controls avoid these disadvantages by providing an institutional framework to accomodate any land use problem which arises anywhere within the state. Further, if state planning and control is actively exercised throughout the state, many land use problems can be avoided or solved in their incipient stages. In order to avoid these limitations of critical area legislation and in appreciation of the compelling logic

82. FALTERMAYER, *supra* note 18, at 163. In addition to having aesthetic, ecological, and recreational value, the waters of the bay also provide an important climate-moderating influence on the weather of the Bay Area. Comment, *San Francisco Bay: Regulation for its Protection and Development*, 55 CALIF. L. REV. 728, 732 (1967). Fear was also expressed for the destruction of much of the plant and fish life in the bay. THE USE OF LAND, *supra* note 21, at 49.

84. CAL. GOV'T CODE § 66603 (West 1966), *as amended*, CAL. GOV'T CODE § 66603 (West Supp. 1974).

85. CAL. GOV'T CODE § 66610(b) (West Supp. 1974).

86. *Id.* § 66632.

87. Legislative guidelines establishing proper purposes for approval of bay fill construction projects were enacted in 1969. Such waterfront projects are limited to water-oriented uses for which no suitable upland alternative exists. *Id.* § 66605(b).

88. BCDC has alleviated much of the fear of deterioration, but at the expense of provoking fears of overzealous enforcement and stagnation of all business connected with the waterfront. It has been accused of regarding any proposed shoreline development as inherently detrimental. BOSSELMAN & CALLIES, *supra* note 62, at 119-20. THE QUIET REVOLUTION devotes nearly thirty pages to a comprehensive analysis of BCDC and the problems it has both solved and created. *Id.* at 108-135.

behind the concept of state land use controls, five states have experimented with such systems in the past decade.

Hawaii

In 1961 Hawaii became the first state to institute statewide land use control. The legislature created the State Land-Use Commission[89] and authorized it to classify all the land of the state as "urban," "agricultural," or "conservation."[90] The state's four counties make specific land use decisions within the urban districts in much the same manner as conventional municipal zoning is accomplished in other states.[91] Land use within the agricultural districts is regulated directly by the land use commission.[92] Another state agency, the Department of Land and Natural Resources, regulates the conservation districts.[93]

It appears, however, that effective statewide land use control is possible in Hawaii because of circumstances which are unique to that state. The two most unusual factors are the simplicity of the Hawaiian political structure and the highly concentrated ownership of land there.[94]

Maine

In 1969 Maine adopted a statewide land use control scheme.[95] The Maine legislation is similar to that of Hawaii since it utilizes the technique of direct control of land use by the state, rather than indirect control by state review of local governmental decisions.[96] A state Land Use Regulation Commission[97] is empowered to classify the land of the state into four "land use guidance districts."[98] A developer

89. HAWAII REV. STAT. tit. 13, §§ 205-1 to -15 (1968).

90. *Id.* § 205-2 (Supp. 1972). The legislature added a fourth classification, "rural," in 1963. Rural districts are composed primarily of small farms and "very low density" residential areas, while agricultural lands are those with a "high capacity for intensive cultivation." *Id.*

91. Denney, *State Zoning in Hawaii: The State Land-Use Law*, 18 ZONING DIGEST 89 (1966) [hereinafter cited as Denney].

92. BOSSELMAN & CALLIES, *supra* note 62, at 8.

93. *Id.* at 10. HAWAII REV. STAT. tit. 13, § 205-5 (Supp. 1972).

94. Denney, *supra* note 91, at 90-1. The entire island of Oahu comprises one political subdivision with the mayor of Honolulu as its chief executive. "There are no incorporated cities. Thus the situation is one of stunning simplicity compared with the multi-layered jurisdictional tangles common in states on the mainland." *Id.* at 91. For a thorough examination of the operation of the Hawaiian statute, see BOSSELMAN & CALLIES, *supra* note 62, at 5-53.

95. ME. REV. STAT. ANN. tit. 12, §§ 681-89 (Supp. 1972).

96. Walter, *The Law of the Land: Development Legislation in Maine and Vermont*, 23 MAINE L. REV. 315, 342 (1971) [hereinafter cited as Walter].

97. ME. REV. STAT. ANN. tit. 12, § 683 (Supp. 1972).

98. *Id.* § 685-A. The district classifications in Maine are "protection," "management," "development" and "holding." *Id.*

must obtain a permit issued by the commission before construction can begin on any new structure, building, or development.[99] The developer must comply with "land use guidance standards" promulgated by the commission[100] as a prerequisite for approval of the permit.[101]

The Maine legislation differs from Hawaii's in an important aspect: Maine's land use commission has the power to regulate *only* the unincorporated areas of the state.[102] This limitation means that conflicts between municipal planning and zoning and the land use control exercised by the state are inevitable. However, the possibility of conflicting and incompatible patterns of regulation is mitigated somewhat by the dearth of municipal planning and zoning in Maine. Only one-third of the state's municipalities are incorporated and only fifteen percent of the incorporated municipalities are engaged in zoning.[103] Therefore, little opportunity exists in Maine for the functional and geographic fragmentation in land use control which is common to most areas of the country.

Another factor which facilitates the coordination of land use decisions between municipalities and unincorporated areas in Maine is the Site Location Law[104] of 1970. The Site Location was designed to ensure the environmental soundness of new governmental, commercial (including residential subdivisions) and industrial developments to be located anywhere within the state.[105] The Environmental Improvement Commission created by the Site Selection Law reviews plans for any "development which may substantially affect the environment"[106] and has veto power over any development which it finds may have an "adverse effect on the natural environment."[107]

The adoption of the Site Selection Law was primarily motivated by undesirable side effects of a burgeoning vacation home industry and a proposal to locate a major crude oil shipping terminal on the state's coastline.[108] The absence of municipal dominance in land use control as well as the bucolic nature of the state itself seem to have combined to smooth the path for Maine's effective legislation.

99. *Id.* § 685-B.
100. *Id.* § 685-A.3.
101. *Id.* § 685-B.4.E.
102. *Id.* § 683.
103. BOSSELMAN & CALLIES, *supra* note 62, at 198.
104. ME. REV. STAT. ANN. tit. 38, §§ 481-88 (Supp. 1972).
105. *Id.* §§ 481, 482.2.
106. *Id.* § 482.2. Generally, only developments which exceed twenty acres in size require commission approval. The possibility of overlap in jurisdiction and conflict in decision between the Environment Improvement Commission and the land use commission has been noted by commentators. Lamm & Davison, *supra* note 69, at 30-1.
107. ME. REV. STAT. ANN. tit. 38, § 483 (Supp. 1972).
108. BOSSELMAN & CALLIES, *supra* note 62, at 187.

Vermont

In 1969 the Vermont legislature adopted a regulatory system[109] which established an environmental board[110] with the authority to formulate a state land use plan "which determine[s] in broad categories the proper use of the lands in the state whether for forestry, recreation, agriculture, or urban purposes . . . ."[111] A permit must be obtained from the board prior to commencing construction of any development[112] or subdivision which involves ten or more acres of land.[113]

Unlike the unified statewide system in Maine, Vermont is divided into seven regional districts. A commission in each district administers the land use program.[114] This subdelegation of power should result in greater local and regional participation in the planning and operation of the program, and it may provide more flexibility than an omnibus statewide agency. As is the case with the Maine legislation, Vermont's statutes are aimed primarily at regulating corporate developers of recreational, retirement, and second-home housing projects.[115] Except where large new developments or subdivisions are concerned, there is no attempt to impose statewide or regional considerations upon the local governments. However, there is again little opportunity for conflict between state and local regulation because in Vermont, as in Maine, local planning and zoning is scarce, and even where it is functioning it is often vaguely defined and ineffective.[116]

Colorado Land Use Act

Colorado adopted new land use control legislation in 1970. The Colorado Land Use Act[117] established a land use commission for the state which has the power to formulate a state land use planning program.[118] In framing the program, "the commission shall recognize that the decision-making authority as to the character and use of land shall be at the lowest level of government possible, consistent with the purposes of [the act]."[119] In order to remain within this frame-

109. VT. STAT. ANN. tit. 10, §§ 6001-91 (1973).
110. *Id.* § 6021(a).
111. *Id.* § 6043.
112. *Id.* § 6081.
113. *Id.* § 6001(3).
114. *Id.* § 6026.
115. BOSSELMAN & CALLIES, *supra* note 62, at 56.
116. *Id.* at 63. For discussion and criticism of both the Maine and Vermont legislation, see Walter, *supra* note 96.
117. COLO. REV. STAT. §§ 106-4-1 to -4-4 (Supp. 1971).
118. *Id.* § 106-4-3(1)(a).
119. *Id.* § 106-4-3(1)(b).

work and yet at the same time to impose state and regional considerations on important local decisions, the commission has been empowered to establish guidelines which will classify certain matters as either statewide, regional, or local concern and which will determine the proper roles and responsibilities of each level of government.[120] The commission must report to the state legislature in 1974 with a complete and functional program for land use planning and control.[121]

Although Colorado is suffering from many land use problems which include the uncontrolled development of wilderness areas, air pollution, and water shortages,[122] the Colorado Land Use Act appears to have been enacted primarily in response to the proposed location of the 1976 Winter Olympics in the Denver region.[123] Aside from a land use planning program which will be drawn up by the commission, the only provision for state control over local decisions contained in the act is a cumbersome proceeding culminating in a personal review by the governor whenever local governments refuse to cooperate with the land use commission.[124] This control technique is intended to be only a temporary procedure which will be utilized until the planning program of the commission is submitted to the legislature.[125] Until the nature of the commission's planning program becomes known, any judgment on the effectiveness of the Colorado legislation must be reserved.

The Florida Environmental Land and Water Management Act of 1972

In 1972 Florida joined the ranks of the few states which have recognized that effective land use regulation in urbanized society is not possible using only the tools of municipal planning and zoning. The Florida Environmental Land and Water Management Act of 1972[126] provides for an element of state control of land use whenever decisions by local governments involve "areas of critical state concern"[127] or "developments of regional impact."[128]

Areas of "critical state concern" are described in the act as those

120. *Id.*

121. *See* Morison, *A Critique from the Colorado Viewpoint*, 5 NAT. RES. LAW 297, 299 (1972).

122. Cameron, *Growth Is a Fighting Word in Colorado's Mountain Wonderland*, FORTUNE, Oct. 1973, at 148.

123. The proposal to bring Olympic Games to Colorado is mentioned throughout the act. COLO. REV. STAT. § 106-4-3(1)(f)(i), 1 (f)(ii), (1)(g)(i), 1(g)(iii) (Supp. 1971).

124. *Id.* § 106-4-3(2)(a).

125. *Id.* § 106-4-3(1)(a).

126. FLA. STAT. ANN. §§ 380.012-.10 (Supp. 1973).

127. *Id.* §§ 380.05(5)-(11), 380.07(2).

128. *Id.* § 380.07(2).

areas "containing, or having a significant impact upon environmental, historical, natural or archaeological resources of regional or statewide importance, [and] affected by, or having a significant effect upon, an existing or proposed major public facility . . . ."[129] The act provides for the boundaries of areas of critical state concern to be designated by the administration commission,[130] a board composed of the governor and the cabinet.[131] Local land use regulations within areas of critical state concern must be consistent with established state guidelines for development within the area. The state land planning agency, subject to the administration commission's approval, can promulgate new state regulations in areas of critical state concern where no local land use control is being exercised.[132] The state agency also has the power to supersede local regulations which are inconsistent with the state guidelines.[133] If a local government permits or denies a development within an area of critical state concern and the state planning agency believes that the local decision violates the state guidelines, the agency can appeal the development order to the Florida Land and Water Adjudicatory Commission.[134] Following a hearing on the propriety of the development, the adjudicatory commission may grant or deny permission for the development to proceed.[135]

The act also provides for an element of state control over local decisions that involve a "development of regional impact," defined by the act as "a development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county."[136] In accordance with the provisions of the act,[137] more specific "guidelines and standards" stating what types of projects constitute developments of regional impact were adopted by the administration commission in March, 1973. Among the enumerated developments were mines, power plants, shopping centers, airports, large subdivisions, and other large-scale projects.[138] A developer of a project which falls within those

129. *Id.* § 380.05(2)(a)-(b). The "critical interest" designation also includes "a proposed area of major development potential . . . designated in a state land development plan." *Id.* § 380.05(2)(c).

130. *Id.* § 380.05(1)(b).

131. *Id.* § 380.031(1). The commission acts by simple majority vote. *Id.*

132. *Id.* § 380.05(8).

133. *Id.*

134. *Id.* § 380.07(2).

135. *Id.* §§ 380.07(3)-(5).

136. *Id.* § 380.06(1).

137. *Id.* § 380.06(2).

138. THE USE OF LAND, *supra* note 21, at 66. The guidelines are very specific, prescribing the number of units which make a housing development of sufficient size to have regional impact and utilizing other precise measurements to determine whether developments of different types will involve regional impact. Measurements used in-

categories will still proceed through local government channels in attempting to obtain approval for his development.[139] The local government is responsible for notifying the state land planning agency and the applicable regional agency, if one exists, of the pending application.[140] The local decision may be appealed by the landowner or developer, the regional planning agency, or the state land planning agency to the adjudicatory commission.[141] The adjudicatory commission may grant or deny permission for the development as well as attach or remove conditions or restrictions on the granting of the development application.[142]

The Florida legislation is not as comprehensive as it first appears to be. The act limits the amount of the state's land which can be classified as an area of critical state concern to 5 percent at any particular time.[143] This may well prove to be a burdensome restriction in a state such as Florida where large areas of forest, swamp, and wetlands present environmental problems. In comparison, the Maine land use legislation[144] subjects 42 percent of the state's land to the regulatory power of the state Land Use Regulation Commission.[145] Limiting the use of the "area of critical state concern" classification to 5 percent of the state's land means that land use control in the remaining 95 percent of the state is subject to state influence only by means of the "development of regional impact" provisions of the act. Limiting state regulation to developments of regional impact in the overwhelming majority of the state may prove inadequate to the task of "facilitat[ing] orderly and well-planned development," one of the main purposes of the act.[146]

Even if the 5 percent limitation on areas of critical environmental concern does prove a hindrance to effective land use control, the Florida legislation is clearly the most promising state action which has been taken in the past decade. Although the act was a response to water

clude the total size or number of parking spaces in shopping centers or industrial parks. The minimum size of residential developments which will be considered to have regional impact varies according to the size of the county in which it is located.

139. FLA. STAT. ANN. § 380.06(6) (Supp. 1973).

140. *Id.* § 380.06(7).

141. *Id.* § 380.07(2).

142. *Id.* § 380.07(5).

143. *Id.* § 380.05(17).

144. See text accompanying notes 95-108 *supra.*

145. Lamm & Davison, *supra* note 69, at 30.

146. FLA. STAT. ANN. § 380.021 (Supp. 1973). For a contrary opinion, see Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URBAN L. ANN. 103, 122 [hereinafter cited as Finnell]. Professor Finnell believes that the 5% limitation is one of several plus factors which assure that the state will intervene "only when there is a compelling state interest backed by a strong public consensus."

management problems in South Florida[147] and further problems caused by a great population influx into Dade County,[148] the legislature did adopt legislation of statewide application rather than adopt the alternative of critical area legislation.[149] This choice by the Florida legislature is auspicious. Whereas Hawaii, Maine, Vermont, and Colorado have distinct geographical, historical, or social conditions which contributed heavily to their adoption of statewide controls, Florida is a large, populous state which has all the urban, agricultural, recreational, and industrial problems that are found in many other states. Thus, Florida is the first state which can be described as a "typical state" which has adopted comprehensive statewide land use controls. This fact has led one commentator to suggest that the Florida legislation may serve as a model for other states.[150] While this is undoubtedly true, it is submitted that other states would be better advised to pattern any future legislation after the model for the Florida act:[151] the American Law Institute's Model Land Development Code.

The A.L.I. Model Land Development Code

In 1963 the American Law Institute began work on its Model Land Development Code,[152] the first model legislation in the land use planning and control field since the Standard State Zoning Enabling Act of the 1920s.[153] The Model Code was envisioned as reshaping into a more modern and effective form all the state enabling legislation pertaining to zoning, land subdivision, city planning, and urban redevelopment.[154] The code contains a total of twelve articles, two of which are of interest here: article 7, entitled "State Land Development Regulation," and article 8, entitled "State Land Development Planning."

Article 7: State Land Development Regulation

Embracing the apparent trend to statewide land use controls, ar-

147. *Id.* at 112.

148. THE USE OF LAND, *supra* note 21, at 37.

149. *See* text accompanying notes 68-88 *supra.*

150. Finnell, *supra* note 146, at 136.

151. THE USE OF LAND, *supra* note 21, at 64; Lamm & Davison, *supra* note 69, at 34; Finnell, *supra* note 146, at 114. The similarities between portions of the Florida legislation and the Model Land Development Code are not surprising. The Associate Reporter for the Model Code, Fred Bosselman, also served as consultant to the "Governor's Task Force on Resource Management," the group responsible for drafting the Florida act. *Id.* at 103.

152. ALI MODEL LAND DEVELOPMENT CODE at vii (Tent. Draft No. 1, 1968).

153. Babcock, *Comments on the Model Land Development Code*, 1972 URBAN L. ANN. 59, 66 [hereinafter cited as Babcock].

154. ALI MODEL LAND DEVELOPMENT CODE at vii (Tent. Draft No. 1, 1968).

ticle 7 of the Model Code draft of 1968 proposed the creation of a state planning agency with mandatory authority over some land use decisions of local governments.[155] However, perhaps as a precaution against adverse reactions by local governments, the code gave the state agency veto power over local zoning decisions only in situations involving local regulations which would "unreasonably restrict developments of regional benefit to be undertaken by public or quasi-public agencies."[156]

Advocating greater authority and more comprehensive responsibilities for the state land-use planning agency, the tentative draft of article 7 submitted to the Institute in 1971 recognized that one of the major problems in the area of land use control is separating local decisions with only local impact from local decisions which have regional or statewide impact.[157] Accordingly, while the 1971 Model Code draft continued to channel all applications for development permits through the local land use control agencies, it also made certain that proper weight would be given to statewide and regional considerations. The infusion of extramunicipal and extracounty considerations was accomplished by the delineation of enforceable statewide standards and the authorization of a state board to hear appeals from those local decisions which involve statewide or regional impact.[158]

In general terms, article 7 of the 1971 Model Code draft proposed that land use policy formulation should be accomplished by the state legislature and a State Land Planning Agency. Local agencies would solve local problems within the parameters of the statewide policy while the State Land Adjudicatory Board would function as an appellate court to ensure that local decisions comport with the state guidelines.[159] Specifically, the interjection of statewide and regional considerations into the local decision-making process would be accomplished by state control of development in areas designated by the State Land

155. *Id.* §§ 7-101, 7-205.

156. *Id.* § 7-402; Commentary to art. 7, at 194. The state agency could also override local regulations which restrict development of land within one-quarter mile of a government-owned "public facility." *Id.* § 7-403(1). This limited scope of state control over local decision making caused one commentator to complain that the 1968 draft of the code offered little in the way of promising innovation since the powers it proposed for the state land use agency differed little from those already the norm among the states. Schulman, *The American Law Institute's Model State Planning and Zoning Statutes*, 2 LAND-USE CONTROLS Q. 1 (no. 2) (1968).

157. *See* ALI MODEL LAND DEVELOPMENT CODE, Commentary to Art. 7, at 5 (Tent. Draft No. 3, 1971). Separating local and regional land use decisions is a premise upon which the code is based. Babcock, *supra* note 153, at 60.

158. ALI MODEL LAND DEVELOPMENT CODE § 7-101, note at 7-8 (Tent. Draft No. 3, 1971).

159. *Id.*, Commentary to art. 7, at 6.

Planning Agency as "Districts of Critical State Concern,"[160] "Developments of State of Regional Benefit,"[161] and "Large Scale Developments."[162] These three categories of development delineate decisions having regional or statewide repercussions from those with only local impact.[163] If a land development proposal before a local body fails to fall within any of these three categories, it would be considered to have only local impact;[164] hence, the disposition of the proposal would be left entirely to local authorities. Thus, it is obvious that article 7 of the 1971 Model Code draft would give a state control over many more land use decisions that would article 7 of the 1968 draft.

Article 8: State Land Development Planning

It should be noted that article 7 of the Model Code provides no role for regional agencies in the regulation of land development; state and local agencies occupy the entire field. Article 8 of the Model Code, which governs the planning function, reflects a similar rejection of any role for independent or autonomous regional planning bodies.[165] The probable lack of coordination between regional agencies has been cited as the primary reason for the code's failure to recommend independent regional planning bodies.[166] But the notion of regional participation in the planning process has not been completely spurned. The state planning agency is authorized to partition the state along regional lines and to create regional planning divisions which would be responsible to the state agency.[167] Thus, the state agency could delegate its powers to a regional division which could in turn prepare the plan for that region.[168] However, the state agency would retain

160. *Id.* §§ 7-201 to -208. Development in districts of critical state concern is of interest to the state because of the location of the proposed project. Babcock, *supra* note 153, at 63.

161. ALI MODEL LAND DEVELOPMENT CODE §§ 7-301 to -303 (Tent. Draft No. 3, 1971). These projects are important to the state because of the type of development. Babcock, *supra* note 153, at 63.

162. ALI MODEL LAND DEVELOPMENT CODE §§ 7-401 to -405 (Tent. Draft No. 3, 1971). "Large Scale Developments" are of concern to the state because of their magnitude. Babcock, *supra* note 153, at 63.

163. For a discussion of the specifics regarding which types of developments fall within each of these categories, see Fisher, *A Giant Step Forward But Insufficient and Already Dated,* 1971 LAND-USE CONTROLS ANN. 61, 61-64.

164. *See* ALI MODEL LAND DEVELOPMENT CODE, Commentary to Art. 7, at 5-6 (Tent. Draft No. 3, 1971).

165. *Id.* Commentary to art. 8, at 51. For a criticism of the code's handling of the role of regional planning, see Wise, *What Happened to Regionalism,* 1971 LAND USE CONTROLS ANN. 71, 74-75.

166. ALI MODEL LAND DEVELOPMENT CODE, Commentary to art. 8, at 51 (Tent. Draft No. 3, 1971).

167. *Id.* § 8-102(1); Commentary to art. 8, at 51-52.

168. *Id.*, Commentary to art. 8, at 52.

full control of the contents of any regional plan and could alter such a plan at any time.[169]

Although it is only in the draft stages, the Model Code has already influenced state legislation. As noted previously, the Florida Environmental Land and Water Management Act[170] contains provisions similar to those found in article 7 of the Model Code.[171] Because it is the first new uniform act in the land use field in more than forty years, the Model Code is expected to have a significant impact on future state legislation.[172] The Model Code already has influenced several pieces of legislation currently pending before both houses of Congress.[173] If adopted, this federal legislation should promote state legislation similar to that contained in the Model Code.

Pending Federal Legislation

The country's land use problems and the states' failure to reclaim some of their authority in the land use field has not escaped the attention of members of Congress, especially Senator Henry M. Jackson of Washington. In 1970 Senator Jackson introduced the Land and Water Resources Act,[174] the first land use legislation of national scope ever considered by the United States Congress.[175] No floor action was taken on this bill by the Ninety-first Congress,[176] but Senator Jackson reintroduced the same measure in the Ninety-second Congress.[177] The Nixon Administration also had become concerned with the nation's land use problems and requested Senator Jackson and Senator Gordon Allott of Colorado to introduce a bill on behalf of the administration in the Ninety-second Congress.[178] The Senate Interior Com-

169. The state agency may delegate any of its functions to a regional division, "subject to . . . review by the [state] Agency as it deems appropriate." *Id.* § 8-102(1).

170. See text accompanying notes 126-51 *supra.*

171. The Florida legislative scheme includes an adjudicatory commission to handle appeals from local land use decisions in the same manner as the adjudicatory board does in the Model Code. The concepts of areas of critical state concern and developments of regional impact/benefits are also common to both acts.

172. THE USE OF LAND, *supra* note 21, at 25. The proposed final draft of the entire twelve articles of the code is to be submitted to the May, 1974 meeting of the American Law Institute. ALI MODEL LAND DEVELOPMENT CODE at xi (Tent. Draft No. 5, 1973).

173. Land Use Policy and Planning Assistance Act of 1973, S. 268, 93d Cong., 1st Sess., § 203(c) (1973); Land Use Planning Act of 1973, H.R. 10294, 93d Cong., 1st Sess., § 106(a) (1973). The Senate measure has been said to have "borrowed heavily" from the Model Code. Reilly, *New Directions in Federal Land Use Legislation*, 1973 URBAN L. ANN. 29, 50 [hereinafter cited as Reilly].

174. S. 3354, 91st Cong., 2d Sess. (1970).

175. S. REP. No. 92-869, *supra* note 19, at 20.

176. *Id.* at 43.

177. National Land Use Policy Act, S. 632, 92d Cong., 1st Sess. (1971).

178. National Land Use Policy Act, S. 992, 92d Cong., 1st Sess. (1971).

mittee combined various provisions of Senator Jackson's bill and the administration's bill in S. 632, The Land Use Policy and Planning Assistance Act of 1972.[179] The committee reported S. 632 on June 19, 1972. After the deletion of punitive sanctions from the bill which had taken the form of the withholding of federal funds in several areas, S. 632 passed the Senate by a 60 to 18 vote.[180] The House of Representatives failed to act on the Senate measure prior to adjournment of the Ninety-second Congress on October 18, 1972; thus, S. 632 died.

At the same time the House was giving a great deal of attention to land use planning and control legislation. During the Ninety-second Congress, a total of nine bills were introduced which, if enacted, would have promoted state land use programs through federal grants and established a national land use policy.[181] None of the House bills reached the floor of the Ninety-second Congress.

Legislative activity on the subject of land use has been even heavier in the Ninety-third Congress. Members of both the Senate and the House have introduced a number of land use bills. Although the House and Senate bills differ in certain aspects, the thrust of them all is the promotion of a much more active state role in the field of land use planning and control.

S. 268: The Land Use Policy and Planning Assistance Act

In January, 1973, Senator Jackson introduced S. 268, the Land Use Policy and Planning Assistance Act of 1973.[182] S. 268 is identical to S. 632 as it passed the Senate in the Ninety-second Congress. The Nixon Administration has again supported legislation, similar to Senator Jackson's bill; however, the administration's bill would offer an additional incentive to encourage state land use control programs which comply with the act. It would provide crossover sanctions which reduce federal grants to recalcitrant states in several areas of federal financial asssitance.[183] However, the objective of both Senator Jackson's bill and the administration's bill is to persuade the states to assume a more active role in land use planning control within their juris-

179. S. REP. NO. 92-869, *supra* note 19, at 44.

180. 118 CONG. REC. S15278 (daily ed. Sept. 19, 1972).

181. H.R. 4332, 92d Cong., 1st Sess. (1971) was typical of six related bills introduced at the request of the administration. H.R. 2173, 92d Cong., 1st Sess. (1971) and two other land use bills were also introduced.

182. S. 268, 93d Cong., 1st Sess. (1973).

183. S. 924, 93d Cong., 1st Sess. (1973). Under the sanctions provisions, grant reductions would occur in the areas of federal funds for airport, development, highway funds, as well as monies available under the Land and Water Conservation Act of 1965. *Id.* § 205(c)-(e).

dictions.[184]

S. 268 would not establish substantive land use policy in Washington and force these federal solutions upon the states; rather, it would attempt to compel each state to consider its land use problems and to forge its own solutions to those problems.[185] In accordance with these dual objectives, the bill would provide maximum flexibility in the range of permissible state action while concomitantly requiring the states to devote careful consideration to legislative programs necessary to ensure rational land use planning and control on a regional or statewide basis.[186] S. 268 would allow the states to comply with its provisions for grant eligibility either by establishing a state land use control program which permits local governments to continue to make most land use decisions subject to state review[187] or by a state agency directly regulating the use of the land.[188]

The overall administration of the federal land use program would be directed by a new agency within the Department of Interior known as the Office of Land-Use Policy Administration.[189] This office would function primarily as an information gathering agency which would channel data to the secretary of the interior regarding the progress of each state in complying with the act's terms of grant eligibility.[190] The secretary would make the final determination of a state's eligibility,[191] but he would be assisted by and receive additional information from the Interagency Advisory Board on Land Use Policy, a group composed of representatives of numerous federal agencies.[192]

184. Senator Jackson feels the legislation will give the states "a little nudge" in establishing more effective and comprehensive state land use control programs. 119 CONG. REC. S11455 (daily ed., June 19, 1973).

185. Not everyone agrees with this proposition. In the debate over S. 632 in the last Congress, some senators expressed their concern that the federal government would become a "nationwide zoning board." See the colloquy between Senators Johnston of Louisiana and Scott of Virginia *id.* at S11468-69. Senator Jackson assured his colleagues that the bill would not create a "bureaucratic monstrosity" in Washington. *Id.* S11653. Senator Tunney remarked that the legislation will only strengthen state control and will not further concentrate federal power. *Id.* S11662.

186. *See* Reilly, *supra* note 173, at 53.

187. S. 268, 93d Cong., 1st Sess. § 203(c)(1) (1973).

188. *Id.* § 203(c)(2).

189. *Id.* § 304. The choice of the Interior Department as the parent organization for the office is criticized in Note, *The Land Use Policy and Planning Assistance Act of 1973: Legislating a National Land Use Policy*, 41 GEO. WASH. L. REV. 604, 613 (1973) because of the Interior Department's lack of experience in land use planning, particularly in urban areas.

190. *See* S. 268, 93d Cong., 1st Sess. § 304(c) (1973).

191. *Id.* § 201.

192. *Id.* § 305(c). Agencies which would be represented on the board include the Departments of Agriculture; Commerce; Defense; Health, Education and Welfare; Housing and Urban Development; Transportation; and Treasury; the Atomic Energy

During the first three years following adoption of the Land Use Act, in order to establish its eligibility for federal grants a state would have to demonstrate that it is "expeditiously proceeding" to develop a state land use planning process.[193] To continue grant eligibility during the two fiscal years following the three-year developmental period, a state would have to have developed "an adequate statewide land use planning process," including a continuing inventory of all the state's land and natural resources; data compilation on population density and environmental conditions; and projections of land requirements for almost every conceivable land use including housing, recreation, and education.[194] States would also have to establish a method of identifying and planning for large-scale developments and designating "areas of critical environmental concern" and areas suitable for "key facilities."[195] Local governments would have to be furnished technical assistance in implementing state and local land use programs and in cooperating with other governmental units.[196]

In addition to the lengthy list of requirements in the overall planning process, each state would have to establish a state land use planning agency in order to maintain its grant eligibility.[197] This agency would have "primary authority" for the state's land use program and would make certain that the state's overall program would be coordinated with local and federal programs, as well as with the programs of other states.[198] The states would have to scrutinize closely "land sales or development projects," including a requirement, as a minimum, of state review of any project as to the financial capability of the developer, the adequacy of the mapping of lots, and the environmental soundness of the project location; *i.e.*, adequate water, sewage, and power.[199]

In order to retain its eligibility for federal grants beyond the initial five years following passages of the act, a state would be required to develop "an adequate land-use program" which would have to include a statement of state land use policies and objectives in addition to the features described above.[200] Further, a state would have to exer-

Commission; the Council on Environmental Quality; the Council of Economic Advisors; the Environmental Protection Agency; and the Office of Management and Budget. *Id.* § 305(b).

193. *Id.* § 201(b).
194. *Id.* § 202(a).
195. *Id.* § 202(a)(8).
196. *Id.* § 202(a)(9)-(10).
197. *Id.* § 202(b).
198. *Id.* § 202(b)(1), (4).
199. *Id.* § 202(d).
200. *Id.* § 203(a)(1)-(2).

cise control over land use in areas of "critical environmental concern" and other areas which might be adversely affected by the introduction of "key facilities."[201] Areas of "critical environmental concern" are defined by the act as areas "designated by the State . . . where uncontrolled or incompatible development could result in damage to the environment . . . or the long term public interest which is of more than local significance."[202] "Key facilities" include airports, recreational lands, energy generation and transmission installations, and major highway interchanges.[203]

To remain eligible for grants beyond the first five years, a state would also have to "[assure] that local regulations do not arbitrarily or capriciously restrict or exclude development of public facilities, housing, or utilities of regional benefit . . . ."[204] On its face, this provision appears to afford some remedy for the problem of exclusionary zoning found in many communities across the nation.[205] However, the degree of "arbitrariness" or "capriciousness" which local decisions would be forbidden to encompass may be difficult to determine, and the effectiveness of this remedy consequently may be limited.

In asserting control over land use decisions in areas of critical environmental concern, key facilities, large-scale developments, and several other important areas,[206] a state would be able to choose between two types of programs. It could create an administrative review program which would assure that local decisions remain within the state's established guidelines. Alternatively, the state might select a program of direct state land use planning and regulation.[207] This option was apparently designed to allow Hawaii to comply with the act by continuing its successful statewide planning and zoning program[208] while simultaneously encouraging the type of land use control system advocated in the American Law Institute's Model Code.[209]

201. *Id.* § 203(a)(3)(A)-(B).

202. *Id.* § 601(i).

203. *Id.* § 601(j).

204. *Id.* § 203(a)(3)(C).

205. Exclusionary zoning is that type of zoning which "prescribes a substantial minimum floor area or lot size for residential dwellings and thus has the effect of raising the price of residential access to the affected area." Sager, *supra* note 63, at 781.

206. Other regions where state influence must make itself felt include "new towns," coastal zones, and areas in which local regulations restrict development of public facilities, housing or utilities of regional benefits. S. 268, 93d Cong., 1st Sess. § 203 (1973).

207. *Id.* § 203(c).

208. See text accompanying notes 89-94 *supra.*

209. As explained at text accompanying notes 157-64 *supra,* the ALI Model Code proposes a system which retains the local role in land use decision making but injects regional and statewide considerations into the planning and control process by means of state review of some local decisions.

The Land Use Policy and Planning Assistance Act of 1973 would authorize over $1 billion to carry out its purposes during the eight years following its enactment;[210] grants to the states would total $800 million.[211] During the first five years, the federal government would pay 90 percent of each eligible state's cost of developing a land use program.[212] Federal funding for the next three years would amount to two thirds of the cost of administering the land use program.[213]

Senator Jackson introduced an amendment to S. 268 which would have imposed "crossover sanctions"[214] against the states which refuse to implement state planning and control programs which comply with the act. These were the same sanctions which were contained in S. 632 as reported out of the Interior Committee but which were deleted from that bill prior to its passage by the Senate in the Ninety-second Congress.[215] These same sanctions also appear in the administration's land use bill introduced in the Ninety-third Congress.[216] The apparent purpose of the sanctions provision is to make noncompliance with the act so onerous that every state will adopt a land use planning and control program in order to avoid the loss of federal funds.[217] Senator Jackson's amendment to reinstate sanctions in the act was the most hotly debated topic during the Senate's four day discussion of S. 268.[218] The amendment was finally rejected by a 44-52 vote,[219] possibly because the majority thought that it might place too much power in the hands of the Secretary of Interior.[220] Following the lively debate on the sanctions amendment, the final vote on S. 268 seemed almost anticlimactic; the act passed the Senate by a healthy 64-21 margin.[221]

H.R. 10294: The Land Use Planning Act of 1973

During the opening months of the Ninety-third Congress, four similar bills were introduced in the House which would establish a

210. S. 268, 93d Cong., 1st Sess. § 608 (1973).

211. *Id.* § 608(a).

212. *Id.* § 606(a).

213. *Id.*

214. S. 268, 93d Cong., 1st Sess., Amdt. No. 233 (1973). "Crossover sanctions" were discussed at note 183 *supra* and accompanying text.

215. S. 632, 92d Cong., 1st Sess. § 307(c)-(e) (1973).

216. S. 924, 93d Cong., 1st Sess. § 205(c)-(e) (1973).

217. Remarks of Senator Haskell, 119 CONG. REC. S11510 (daily ed. June 20, 1973).

218. *See generally id.* S11506-18.

219. *Id.* S11518.

220. Senator Dewey Bartlett of Oklahoma stated this proposition in a colorful manner. He expressed a fear that giving the power of crossover sanctions to the secretary of the interior would create a "zoning czar." *Id.* S11513.

221. *Id.* S11663 (June 21, 1973).

national land use planning program.[222] One of these bills, H.R. 2942, was introduced by Congressman Bill Young of Florida is identical to S. 632 as it passed the Senate in the Ninety-second Congress.[223] The administration bill, H.R. 4862, was introduced by Congressman John Saylor of Pennsylvania and is identical to the administration's Senate bill, S. 924. The four bills were referred to the Environment Subcommittee of the House Interior Committee for hearings in the spring of 1973. Under the leadership of its chairman, Congressman Morris Udall of Arizona, the Environment Subcommittee opted to construct its own version of a national land use act rather than work from the foundation of S. 268 as passed by the Senate in June. The result of the subcommittee's labors was introduced by Congressman Udall as a new bill, H.R. 10294,[224] in September of 1973.

The provisions of H.R. 10294 do not differ radically from those contained in S. 268.[225] The general purpose of both bills is to provide federal financial encouragement for the development of land use planning programs by the states. Like S. 268, H.R. 10294 would authorize the federal program to be administered by the Office of Land Use Planning Administration which would be located in the Department of Interior.[226] An Interagency Land Use Policy and Planning Board,[227] composed of representatives of various federal agencies, would be created by the House bill just as it would be by the Senate bill; that board would assist the secretary of interior in determining whether a state was in compliance with the act.[228] H.R. 10294, like S. 268, would require each state to develop a comprehensive state land use planning process in order to remain in compliance with the act.[229] That process would have to include a method of ensuring that the land use decisions of local governments are consistent with the best interests of the state as a whole.[230] To provide the necessary

222. H.R. 2942, 4862, 6460, 7233, 93d Cong., 1st Sess. (1973).

223. *Hearings on H.R. 4862 Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs,* 93d Cong., 1st Sess., ser. 93-8, at 1 (1973).

224. H.R. 10294, 93d Cong., 1st Sess. (1973).

225. An earlier subcommittee print of what was to become H.R. 10294 contained some significant differences from S. 268. The largest flaw in the earlier print was the authorization of federal funding for only three years. SIERRA CLUB BULL., July-Aug., 1973, at 29. The bill which was actually introduced adopts the same eight-year funding period contained in S. 268. H.R. 10294, 93d Cong., 1st Sess. § 409(a)(1) (1973).

226. *Id.* § 401(a).

227. *Id.* § 402(a).

228. *Id.* § 402(c).

229. *Id.* § 104.

230. *Id.* § 104(e).

state authority over local governments, the House bill employs the same technique as S. 268; that is, identification, designation, and control by the state in areas of critical environmental concern, key facilities, developments of regional benefit, and large-scale developments.[231]

The House bill differs from the Senate bill in two important respects. First, H.R. 10294 would reduce the total appropriation under the act to $878 million for the first eight years of the federal program.[232] The funding formula for state financial assistance under the House bill would obligate the federal government to provide only 75 percent of the development and administration costs of state planning programs,[233] while S. 268 would place the federal government's share at 90 percent of the development costs and two thirds of the costs of administering the state programs.[234] However, the most important distinction between the House and Senate bills is the inclusion of "cross-over sanctions" in H.R. 10294,[235] the same sanctions which were twice deleted from the Senate legislation. Apparently the congressmen who advocated the "stick-rather-than-carrot" approach were not easily discouraged by the Senate's position.

Aside from the sanctions provision, S. 268 and H.R. 10294 both are bills which are capable of easy reconciliation following passage of the House measure; both should offer an opportunity for nationwide promotion of rational and effective state land use legislation. Passage of this legislation alone would neither solve completely and finally all the problems of fragmented land use control in urban areas nor totally prevent uncontrolled and destructive development in rural areas; it would, however, provide an unprecedented opportunity and incentive for the states to return order and logic to the land use decision-making process within their jurisdictions by reclaiming some of the police power abandoned to local governments long ago.[236]

Conclusion

In the field of land use control and regulation in this country, four complementary forces have recently coalesced to produce a climate which makes some legislative progress inevitable. Occurring first in point of time among these factors was the experience of a handful of states in finding "critical area legislation" to be both effective in coordinating governmental activity and politically popular.[237] The

231. *Id.* § 106(b)(1).
232. *Id.* § 409(a).
233. *Id.* § 410(a).
234. S. 268, 93d Cong., 1st Sess. § 606(a) (1973).
235. H.R. 10294, 93d Cong., 1st Sess. § 112 (1973).
236. Reilly, *supra* note 173, at 55.
237. See text accompanying notes 70-88 *supra.*

second contributing factor is the model legislation developed by the American Law Institute which provides a sound framework for any state desiring to confront effectively regional and statewide land use problems.[238] The favorable experiences of the few states which have attempted regulation similar to that endorsed by the Institute[239] provide the third factor, which suggests that comprehensive regional and statewide controls are no longer untried theories; rather, they offer sound and workable solutions to land use problems common to both the rural and urban areas of this country.

If carried to fruition, the final impetus to significant progress in land use control will be furnished by legislation now before the Congress. The land use bills which have been introduced in both the Senate and the House of Representatives indicate that the Nixon administration and the Congress now recognize the intolerably slow pace of the states' movement toward effective land use control. Aside from the question of crossover sanctions, the major bills are substantially similar. Hopefully the generous federal funding which both bills provide would be sufficient to inspire the states to accelerate the movement toward effective statewide land use control legislation. The passage of either bill is desirable, even if the only effect is to stimulate serious discussion in the state legislatures concerning the proper role of state government in land use control.

*John L. Low IV**

238. See text accompanying notes 152-73 *supra.*

239. The Florida legislation is closest to the format proposed by the ALI Model Land Development Code; however, its adoption is too recent to judge its effectiveness. Maine and Vermont have both enjoyed substantial success with their land-use legislation. See the discussion of the Maine legislation at text accompanying notes 95-108 *supra* and the Vermont legislation at 109-16 *supra.*

* Member, Third Year Class.